SUPREME COURT, U. S.

No. 1296

MAY 19 1967

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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LUPTON MANUFACTURING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, ALUMINUM COMPANY OF AMERICA, and CUPPLES PRODUCTS CORPORATION, *Appellees*.

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**On Appeal from the United States District Court for the Eastern District of Missouri**

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## MOTION OF ALUMINUM COMPANY OF AMERICA AND CUPPLES PRODUCTS CORPORATION TO DISMISS

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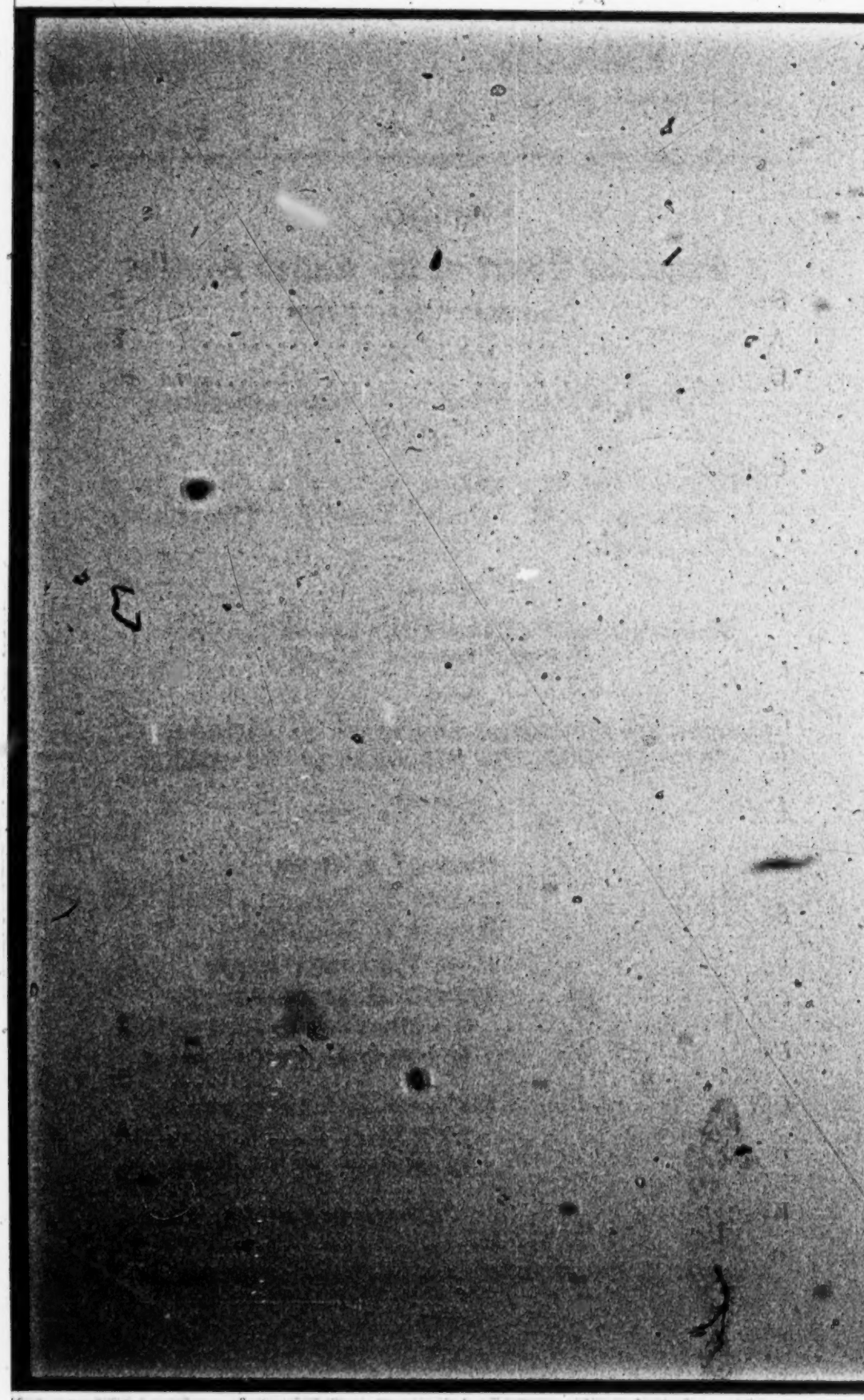

## INDEX


| | Page |
|---|---|
| STATEMENT | 2 |
| ARGUMENT | 7 |
| CONCLUSION | 16 |


## CITATIONS

CASES:


| | |
|---|---|
| *Aluminum Company of America* v. *United States*, 382 U.S. 12 | 3 |
| *Allen Calculators* v. *National Cash Register Co.*, 322 U.S. 137 | 16 |
| *Brotherhood of R.R. Trainmen* v. *Baltimore and Ohio R. Co.*, 331 U.S. 519 | 15 |
| *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 87 S. Ct. 932 | 7, 8, 9, 10, 14, 15 |
| *Continental Insurance Co.* v. *United States*, 259 U.S. 156 | 9 |
| *First Security National Bank & Trust Co.* v. *United States*, 382 U.S. 34 | 9 |
| *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502 | 10 |
| *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 | 15, 16 |
| *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 | 15 |
| *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19 | 15 |
| *United States* v. *Aluminum Company of America*, 233 F. Supp. 718 | 2 |
| *United States* v. *Aluminum Company of America*, 247 F. Supp. 308 | 2 |
| *United States* v. *Aluminum Company of America*, 257 F. Supp. 466 | 4 |
| *United States* v. *ASCAP*, 341 F. 2d 1003 (2d Cir. 1964), cert. denied 382 U.S. 877 | 15 |
| *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 | 16 |

Page

STATUTES AND RULES:

Clayton Act (15 U.S.C. 18)
Section 7 ..... 2

Expediting Act (15 U.S.C. 29)
Section 2 ..... 15

Federal Rules of Civil Procedure
Rule 24(a) ..... 8, 9, 10, 13, 15
Rule 24(b) ..... 15

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Pursuant to Rule 16 of the Rules of this Court, Aluminum Company of America and Cupples Products Corporation move that the appeal in this case be dismissed.

## STATEMENT

This is a direct appeal from an order of the district court (J.A. 4a) denying intervention in the antitrust divestiture proceedings being conducted pursuant to the decision in *United States* v. *Aluminum Company of America*, 233 F. Supp. 718. The district court ruled in that case that the acquisition by the Aluminum Company of America (Alcoa) of the Cupples Products Corporation (Cupples) violated Section 7 of the Clayton Act (15 U.S.C. 18) since it can reasonably be expected substantially to lessen competition in the fabrication and sale of metal curtain wall and aluminum curtain wall (233 F. Supp. at 729-30).

Following hearings to determine the proper method and the scope of the divestiture ordered by the district court, a final judgment was entered on December 4, 1964 requiring Alcoa to divest all of its ownership interest in Cupples and also to divest its interest in an aluminum curtain wall fabricating plant located at Corona, California, which had been built by Alcoa more than two years after its acquisition of Cupples (*United States* v. *Aluminum Company of America*, 247 F. Supp. 308). The judgment provided that divestiture "shall be made in good faith as a going business, shall be absolute, unqualified, and unconditional and to a person or corporation in which defendant Alcoa does not own stock or financial interest" (247 F. Supp. at 317). The final judgment also incorporated the provisions of a preliminary injunction entered on July 30, 1962, designed to prevent Alcoa and Cupples from consolidating or commingling their business assets or good will (247 F. Supp. at 315; R. 184-86, 188). These injunctive provisions were not intended to prevent Alcoa from assisting Cupples in

the ordinary course of business pending divestiture (R. 184-86, 188, 210).

Alcoa appealed to this Court only from that portion of the final judgment which required it to divest the after-acquired Corona plant. On November 5, 1965, this Court granted the Government's motion to affirm (*Aluminum Company of America* v. *United States*, 382 U.S. 12).

On February 18, 1966, pursuant to the Final Judgment, a Plan of Divestiture was fashioned and approved by the district court requiring the divestiture of Cupples "as a going business capable of engaging in the manufacture, distribution and sale of fabricated aluminum products . . . either by sale of Cupples' stock or, at the option of the purchaser, by sale of all Cupples' assets . . . to a person or corporation not disapproved by the Court . . . [and] at a price and upon terms to be approved by the Court" (R. 307).[1] Additionally, detailed steps were specified for obtaining a purchaser and Alcoa was required at 90-day intervals to file with the court and serve upon the Government a report "setting forth the steps taken in execution of this Plan" (R. 307). The Plan provided that in the event no acceptable offer had been received by February 1, 1967, either party could petition for modification of the judgment or of the Plan of Divestiture (R. 307).

Soon after adoption of the Plan of Divestiture, Alcoa concluded negotiations with the principal officers of

[1] Appellant mistakenly identifies this Plan as "Alcoa's plan of divestiture" (J.S. 7). Alcoa's plan, however, was objected to by the Government, whereupon Alcoa filed a revised plan. Following a hearing, the court entered its own modified version of the revised plan.

Cupples (who had also been the principal officers of that company prior to its sale to Alcoa), which resulted in the execution on May 20, 1966 of an agreement to sell Cupples to a new company to be formed by those officers (*United States* v. *Aluminum Company of America*, 257 F. Supp. 466, at 467). Submitted to the district court on May 23, 1966, the proposed sale was finally rejected on August 9, 1966 primarily on the grounds that the prospective purchasers were putting in too little of their own capital; that since Alcoa was being required to finance virtually the whole purchase price and also to provide substantial working capital, the purchasers would lack the independent status required by the Plan of Divestiture; and further, that Alcoa had not sufficiently explored the possibility of finding other purchasers "who have sufficient capital to operate Cupples without relying completely on Alcoa for financing and who will be able, should adverse business circumstances arise, to weather any economic storms . . ." (257 F. Supp. at 468).[2]

Thereafter, as required by the Plan of Divestiture, Alcoa filed reports with the court detailing its diligent and extensive efforts to find a purchaser. Subsequent to the filing of the notice of appeal in this case, Alcoa reported to the district court on February 1, 1967 that it had been unable to locate a purchaser willing to buy the company on terms which the court would approve, and requested an extension of time to July 1, 1967 within which to continue present negotiations and other efforts to secure a purchaser willing and able to con-

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[2] The Plan of Divestiture provides "that nothing herein shall prohibit Alcoa from retaining such reasonable security or other interest [in the divested company] as the court may approve" (R. 307).

tinue the operations of Cupples in the aluminum curtain wall industry (J.S. 13a, 14a). As noted in its report of February 1, 1967, the continuing bleak earnings record of Cupples over the past several years was making the task of finding an acceptable purchaser extremely difficult (J.S. 9a). Most of the potential prospects uncovered by Alcoa had expressed no interest in acquiring the company after seeing Cupples' earnings record (R. 303-04).

The present controversy stems from an announcement by the Port of New York Authority in 1963—before the trial in this case began—of plans to construct a so-called World Trade Center in New York City, to be housed in twin towers which will constitute the tallest buildings in the world. In the fall of 1963 Cupples became interested in fabricating and erecting the curtain wall for this project (J.S. 1a) and by early 1964 was already developing preliminary designs and procedures (R. 215).

In the summer of 1964 before the decision in this case, so-called budget bids for the project were invited from prospective contractors including Alcoa (R. 23). Final bids were submitted on December 2, 1966 (R. 28). Alcoa submitted a bid specifically representing that Cupples would be the fabricator of the curtain wall (R. 24). On December 5, 1966, the Port Authority announced that Alcoa would be awarded the contract. On this date, Lupton made its first complaint to the Department of Justice concerning the World Trade Center contract (R. 139).

The Government immediately made inquiries to the Port Authority and the latter stated that it would not negotiate further with Alcoa pending the outcome of the Government's investigation (R. 219). Upon in-

vestigation the Government learned that Alcoa and Cupples believed that this contract would be valuable business for Cupples and would significantly improve its recent poor earnings record, thereby enhancing prospects for divestiture (R. 183, 187).

Nothing in the Final Judgment or the Plan of Divestiture prohibited Alcoa from aiding Cupples in obtaining business pending divestiture; to the contrary, Alcoa is required to dispose of Cupples "as a going business." However, since Alcoa and Cupples had been enjoined from consolidating their business assets and good will, the Government in the course of its investigation sought and obtained from Alcoa, formally and in writing, several specific assurances. Thus, at the Government's insistence, Alcoa agreed to seek to have the contract awarded directly to Cupples, or failing that, to assign the contract outright to Cupples, if the Port Authority would not agree to either of these courses, to sub-contract the job to Cupples. Alcoa also specifically agreed that it would in no event allow any obligation or commitment undertaken by Cupples relating to the performance of this curtain wall contract to stand in the way of divestiture of Cupples (R. 187, 209).

After thorough investigation, the Government concluded that award of the contract to Cupples was fully consistent with the order of the court looking to timely and effective divestiture (R. 187, 189, 209).

On January 4, 1967, appellant filed motions for leave to intervene (R. 6), for an order to show cause as to why Alcoa should not be found in violation of the final judgment of December 4, 1964 (R. 9), and for a preliminary injunction enjoining execution of the Port

Authority contract (R. 7, 8). The motions were briefly heard on January 4, 1967, following which the court set the matter down for a formal hearing to be held on January 12, 1967, and specifically granted appellant the right at that time to present any testimony or other evidence it might choose relating to its various motions (R. 168). Although appellant was not a party, it was permitted to subpoena witnesses for the hearing, including officers and employees of Cupples, who were examined without restriction. All of the documentary evidence proffered by appellant was received.

Denying appellant's various motions, the district court stated that the Government "has vigorously examined the situation" (J.S. 2a) and that no violation of the final judgment of the court had been revealed. Emphasizing its view that assignment of the contract to Cupples would enhance divestiture, the court held (J.S. 3a-4a):

> The entire process of this trial has been long and tedious, and the ultimate goal sought to be achieved is divestiture. This Court has no intention of permitting Lupton, or any other unsuccessful bidder on a job in which Cupples is interested, to intervene in this already complicated litigation.
>
> * * *
>
> Cupples, like any other company that has been ordered to be sold, has had personnel problems and to deprive it of this particular contract would further complicate its saleability.

## ARGUMENT

Appellant relies on *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 87 S. Ct. 932, the first decision of this Court in more than 25 years allowing intervention in a Government antitrust suit.

Contrary to appellant's intimations, however, neither *El Paso* nor the recent amendment to Rule 24(a) of the Federal Rules of Civil Procedure has eliminated the requirement that a would-be intervenor in such a case demonstrate a particularized interest in the subject matter of the suit which coincides with the interest of the general public and which is not being adequately protected by the Government.

While screened by allegations that it is concerned lest divestiture in this case be ineffective and untimely, it is clear that appellant's only interest is in blocking the award to Cupples of the World Trade Center curtain wall contract, in which event Lupton, an unsuccessful bidder for that contract, would attempt to procure the work for itself. This "interest" in depriving Cupples of a valuable asset is exactly the converse of the interest of the intervenors in *El Paso,* who were seeking the allocation of additional assets to the New Company, and provides no basis for intervention under Rule 24(a).

1. In *El Paso,* following this Court's remand to the district court with directions to order divestiture without delay, the Department of Justice and El Paso stipulated to a divestiture decree in "settlement of the litigation" (87 S. Ct. at 937). The decree bypassed "the prospect of an outright purchase of the assets of the new company or its stock by outside interests" (*id.,* at 940) and provided, among other things, for the formation of a New Company to which certain of the assets acquired by El Paso from Pacific Northwest would be transferred. The State of California, Southern California Edison Company, and Cascade sought to intervene, claiming that the provisions of the proposed divestiture decree were in conflict with the man-

date of this Court that the competitive situation in the natural gas industry in California be restored and that Pacific Northwest or its successor company be reconstituted as a viable competitor.

On appeal from an order denying intervention, this Court concluded that the interest of the State of California and Southern California Edison was sufficient to sustain their right to intervene under former Rule 24(a)(3), since "protection of California interests in a competitive system was at the heart of our mandate directing divestiture" (87 S. Ct. at 937).[3] Cascade, a natural gas distributor in Oregon and Washington whose sole supplier would be the New Company, had no interest in the California market. However, Cascade complained that the stipulated divestiture decree permitted a grossly unfair division of gas reserves between El Paso and the New Company and would also permit El Paso to impose onerous price and other conditions on the New Company, thereby seriously impairing its ability as a supplier to Cascade in the future. This

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[3] There is no such mandate in the present case. Alcoa did not appeal from the judgment of the district court ordering general divestiture, but sought review only of that portion of the divestiture decree which required it to dispose of the plant at Corona, California, constructed by it after the acquisition. This Court affirmed *per curiam*. Thus, there is no need for review in the present case at the instance of the putative intervenor "to see that [the Court's] mandate is carried out" (87 S. Ct. at 937). Compare *Continental Insurance Co.* v. *United States*, 259 U.S. 156, at 166 ("We delegated to the district court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree, in any proper way, is brought to our attention, to see that it follows our opinion") with *First Security National Bank & Trust Co.* v. *United States*, 382 U.S. 34.

Court held that new Rule 24(a)(2) was broad enough to include these interests of Cascade, since, in any event, "the entire merits of the case must be reopened to give California and Southern California Edison an opportunity to be heard as of right as intervenors . . ." (*ibid.*).

The interest of the appellant in the present case is precisely the opposite of the interest of Cascade in *El Paso*. Cascade, and indeed the other intervenors in that case, were customers or potential customers of the company to be divested. In seeking to assure the allocation of adequate assets to the New Company and to prevent the imposition upon it of unfair contracts, the ultimate interest of Cascade in the relief to be ordered by the district court was in assuring the establishment of a strong divested company capable of effective and viable future performance. In seeking intervention for the sole purpose of depriving Cupples of a valuable asset, it is clear that appellant in the present case has no interest in seeing this competitor launched on an economically viable and competitive basis.

Thus, unlike the situation in *El Paso*, appellant's private interest in this case is in the establishment of a weak Cupples. Since this interest is not coincidental with the interest of the public in the divestment of a strong, competitive Cupples, no right of intervention is recognized by *El Paso*, or any other case. Indeed, in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, relied upon in *El Paso*, this Court anticipated applications of would-be intervenors with interests adverse to those of the general public and distinguished such an interest from the one before it as follows (312 U.S. at 508):

> Nor can the enforcement of this [interest of the intervenor] be deemed remotely in conflict with other public duties of the Attorney General, nor to bring in digressive issues, nor to impeach the existing decree. It is a vindication of the decree.

2. Even assuming that appellant has any genuine interest in this case other than the divestment of a weak Cupples and the securing of a large contract for itself, it is clear that award of the World Trade Center contract to Cupples would enhance rather than impede effective divestiture. Because of the poor earnings record of the company during the past several years, Alcoa has been unable to find a purchaser for Cupples which the district court would approve. The World Trade Center contract is expected to improve the earnings of the company significantly, and thus make Cupples more attractive to prospective purchasers.

Appellant relies on the opinion of its president expressed at the hearing on intervention that award of the contract to Cupples would have an adverse effect upon the prospects of divestiture (R. 59-60). This conclusion was based on a belief that prospective purchasers of Cupples would be made uncertain and doubtful as to the actual value of this curtain wall contract, and thereby discouraged from purchasing the company, because of Alcoa's agreement with the Government that certain contracts between Alcoa and Cupples were subject to reformation. The short answer is that appellant's president overlooked the fact that the World Trade Center contract was not one of the contracts subject to this reformation agreement (R. 220).

In any event, the self-serving statement of appellant's president, based on a misconception of the facts,

is completely refuted by the obvious benefits to Cupples of this contract. These benefits include the prestige and profitability[4] of a contract to fabricate and erect the curtain walls of the world's highest structures. Similarly, the contract would assure use of a portion of Cupples' unemployed capacity[5] and its provisions for prefabrication at the plant site rather that at the job and for payment upon inspection rather than at the time of delivery would allow flexible, slack-time production (R. 222). As the district court correctly concluded (J.S. 3a-4a): "Cupples, like any other company that has been ordered to be sold, has had personnel problems and to deprive it of this particular contract would further complicate its saleability."

Nor is there merit in the argument that assignment of the contract would result in a continuation of unlawful ties between Alcoa and Cupples. It is anticipated that the contract will be performed within two years after construction of the World Trade Center begins in 1969. But any relationship between Alcoa and Cupples during the period of construction would

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[4] Appellant suggests an impropriety on the part of Alcoa and Cupples in decreasing the initial Alcoa bid on this contract (J.S. 8). In point of fact, however, this downward modification not only was very "minor" (R. 251) and did not influence the award, but Lupton itself lowered its bid at the invitation of the Port Authority after being informed that all bidders had been given this opportunity and that all had revised their quotations downward (R. 24).

[5] Cupples has operated for a substantial period of time at less then 85% of capacity (R. 222). Fulfillment of the World Trade Center contract would require commitment of approximately 12% of Cupples' total capacity for a period of not more than 4 years from the present date (*ibid.*). Contrary to appellant's contention (J.S. 16), this commitment would not unduly interfere with the ability of Cupples to undertake other curtain wall projects.

be a normal commercial relationship arising out of the ordinary course of business. Similarly, any guarantee which Alcoa may give of Cupples' performance would run to the New York Port Authority and could not result in any unlawful relationship between Alcoa and Cupples in the post-divestiture period.

The implication of appellant's contention is that Cupples should be deprived of any and all business obtained during the period between entry of the divestiture decree and actual sale upon the complaint of competitors who are interested in that business. Clearly such an "interest" does not qualify as a ground for intervention under Rule 24(a) and appellant's argument must be rejected.

3. Appellant was also properly denied leave to intervene in this litigation for the reason that it completely failed to demonstrate that any recognizable interest it may claim to have was not being adequately protected by the Department of Justice.

While not accorded the formal status of a party, appellant was nevertheless, over the objections of Alcoa but with the consent of the Government, permitted to call witnesses, to file briefs, and to argue its motion at length. After hearing appellant's witnesses and argument and receiving its documentary evidence, the court concluded that a case for intervention had not been made out, noting, *inter alia* (J.S. 2a):

> During the entire proceedings the Antitrust Division of the Justice Department has diligently protected the interest of the public in obtaining the goal set out by this Court to restore Cupples to a position as an independent entity in the aluminum fabricating business.

With respect to the World Trade Center contract in particular, the Department of Justice sought and obtained explicit assurances from Alcoa, which were repeated to the court, that the contract would not be permitted to interfere in any way with the divestiture of Cupples and that Alcoa would not represent that it had secured the contract on the basis of its own expertise in the fabrication and erection of curtain wall. In addition, it was at the insistence of the Government that Alcoa undertook to obtain permission from the New York Port Authority to the award of the contract to Cupples.

On March 31, 1967 the Government filed a petition seeking modification of the final judgment to become effective within 90 days if divestiture has not been accomplished by that time. In addition to a number of provisions allegedly designed to speed divestiture, the proposed modification would prevent Alcoa from engaging in the metal curtain wall business, directly or indirectly, for a period of five years from the date of approval of any sale of Cupples.[6]

Thus, unlike the situation in *El Paso,* the Government in the present case has vigorously and diligently sought to deprive Alcoa of any and all benefits it may allegedly have obtained in the curtain wall industry by virtue of the acquisition. Appellant offers no evidence to demonstrate inadequate representation in this respect. Its claim of inadequate protection relates only to the asserted failure of the Government to seek

[6] Alcoa is vigorously opposing the proposed modifications, which it believes are improper and unnecessary. Nevertheless, the Government's petition underscores the fact that it has at all times been alert in guarding what it considers to be the public interest in speedy and effective divestiture.

to deprive Cupples of the World Trade Center contract. As shown above, however, appellant's "interest" in weakening Cupples prior to divestiture cannot sustain intervention as of right under Rule 24(a).

4. It is equally clear that the district court did not abuse its discretion in failing to allow permissive intervention under Rule 24(b). See *Brotherhood of R.R. Trainmen* v. *Baltimore and Ohio R. Co.*, 331 U.S. 519. No statute confers a conditional right to intervene. Since appellant's "claim" involves a purely private desire to wrest the World Trade Center contract from Cupples, no common question of law or fact between that claim and the main action is discernible.[7] And, unlike Cascade in *El Paso* (see Brief of Appellant, No. 4, Oct. Term, 1966, at p. 38), appellant here does not claim that its "interest" can only be protected if it is permitted to intervene in this litigation. See *Sam Fox Publishing Co.* v. *United States* 366 U.S. 683, at 690; *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, at 23.

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[7] The private and ancillary nature of appellant's "interest" in this case raises serious doubt that this Court has jurisdiction under Section 2 of the Expediting Act (15 U.S.C. 29) to review the order of the district court denying appellant's motions. Unlike *El Paso*, appellant here did not attempt to intervene for the purpose of assisting in the formulation of the divestiture decree, and, indeed, appellant has no quarrel with that decree. Intervention was sought solely for the purpose of enjoining an ordinary commercial transaction, a matter of interest only to the private parties involved. As this Court has recognized, "[t]he purpose of the [Expediting] Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party" and is not applicable to a controversy "entirely between private parties . . ." (*Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39, at 40). See also *United States* v. *ASCAP*, 341 F. 2d 1003 (2d Cir. 1954), cert. denied, 382 U.S. 877.

Finally, it should be noted that Rule 24(b) directs the trial court in exercising its discretion to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In the circumstances of this case, there was a proper exercise of discretion by the district court in refusing to permit "Lupton, or any other unsuccessful bidder on a job in which Cupples is interested, to intervene in this already complicated litigation" (J.S. 3a).

## CONCLUSION

Appellant was not entitled to intervene as of right in this Government antitrust suit and the district court did not abuse its discretion in failing to allow permissive intervention. The order denying intervention, therefore, is not appealable and the appeal should be dismissed. See *Westinghouse Broadcasting Co.* v. *United States,* 364 U.S. 518; *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683; *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137.

Respectfully submitted,

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